

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.224 OF 2004

Dhansukhbhai Fakirbhai Patel Appellant
Versus
FakirbhaiDayabhai Patel and Ors... ..Respondents
Smt.Bhavna Shah for appellant
Mr.C.M.Kothari for Respondent no.1

WITH

SECOND APPEALNO.221 OF 2004

Dhansukhbhai Fakirbhai Patel Appellant
Versus
Fakirbhai Dayabhai Patel and Ors.. ..Respondents
Smt.Bhavana Shah for Appellant
Mr.C.M.Kothari for respondent no.1

CORAM : P.V.KAKADE, J.

DATE : 30TH SEPTEMBER, 2005.

ORAL JUDGMENT :

1. Rule. Rule made returnable in both the appeals by consent.

2. Both these appeals arise out of common Judgment passed by the District Court, Dadra & Nagar Haveli at Silvassa and therefore, both the appeals are taken up for hearing and are being heard and disposed of by this common Judgment.

. The District Judge, Silvasa by his common order passed in Misc. Civil Appeal No.1 of 2001 and Misc. Civil Appeal No. 2 of 2001 allowed the appeals and set aside the judgment and order passed by the Civil Court in Execution Proceeding (Misc. Application No.4 of 1993) and remanded the matter to the Trial Court for making necessary enquiry under Order 20 of Rule 18 of the Civil Procedure Code, as regards the quantum of mesne profits. The impugned Order regarding remand of the decree to the Mamlatdar was set aside.

3. The facts involved in the dispute, in nut shell, are thus -

. The original Defendant no.1 Fakirbhai has three sons, namely, plaintiff Dhansukhbhai, defendant no.2 Ashokbhai and defendant no.3 Nileshbhai. The eldest son - plaintiff Dhansukhbhai filed Suit being R.C.S. No.10 of 1984 in respect of properties shown at Schedule "A" and Schedule "B". He claimed injunction as regards the properties shown in Schedule "A" alleging his lawful possession over the same. He claimed partition as regards properties shown in Schedule "B", they are lands situated at Village Athola, consisting of six small

fragments. The suit came to be decreed on 13.12.1988. The Civil Court declared that the plaintiff-Dhansukhbhai had 1/4th share in the properties shown in Schedule "B" and he is entitled to receive separate share by way of partition.

. The decree was sent for effecting partition under Section 54 of Civil Procedure Code. The Mamlatdar proposed partition and made separation of Sharers. The learned Civil Judge appointed PW-Parmar as Court Commissioner to carry out inquiry regarding mesne profits. The learned Trial Court came to the conclusion that the Mamlatdar did not properly set out shares of the parties. However, the Civil Judge accepted the report of the Court Commissioner and held that the Decree Holder was entitled to recover amount of Rs.40,275/= towards mesne profits along with future mesne profits from the year 1995 onwards till he was inducted into the possession. The Trial Court further directed that the decree shall again be sent to the Mamlatdar for effecting the partition as per his direction.

. The Order passed by the Civil Judge directing

remand of the proceeding to Mamlatdar for effecting fresh partition and regarding quantum of the mesne profits was subject of the challenge in the appeal before the lower appellate court. After hearing both the sides the learned District Judge came to the conclusion that once a decree was transferred to the Collector under Section 54 of the Civil Procedure Code, the Civil Court will not have any jurisdiction to decide as to whether the shares are properly demarcated by Revenue Authority. The decree for mesne profits could be executed by making inquiry as regards to its quantum. The provisions of Section 54 and Order 20 Rule 18 of C.P.C., according to the learned District Judge, would be read together. The District Judge sought to put reliance on the ruling of this Court in the case of **Kisan Bhikaji Dalvi through LRs Mohan Kisan Dalvi and Ors. vs. Krishnabhai Maruti Dalvi** reported in **2000(4) Maharashtra Law Journal** holding that the job of the civil court comes to an end by declaration of the shares in the partition. When there is a declaration of share in the partition suit with respect to lands, assessable to land revenue, the job of the Civil Court comes to an end by making such a declaration and all further proceedings regarding effecting partition, may be by

first preparing a final decree and then by executing the same, is to be carried out by the Collector, as per the provisions of Section 54 of C.P.C. In other words, it was held that after the decree was passed, the Civil Court had become functus officio with regard to the said proceeding and with this observation recorded the findings that the appeal deserved to be allowed and order passed by trial court to send the proceeding for fresh partitions to Mamlatdar was set aside on the ground that the Civil Court had no jurisdiction to look into the matter once the decree came to be passed. Present appeals are against the said order.

4. At the outset it must be noted that the substantial question of law in these appeals is common and is to the effect that whether the Civil Court becomes functus officio after it sends the decree to the Collector for partition, in view of the provisions under Section 54 read with Order 20 Rule 18 of the Code of Civil Procedure? As noted earlier, the learned District Judge has put reliance on the case of **Kisan Bhikaji Dalvi (supra)** in order to hold that when there is a declaration of share in the partition suit in respect to lands, assessable to land revenue, the job of the Civil

Court comes to an end by making such a declaration and all further proceedings regarding effecting partition, may be by first preparing a final decree and then by executing the same, is to be carried by the Collector, as per the provisions of Section 54 of C.P.C. All further steps in such a suit are required to be taken by the Collector and for that purpose the Civil Court has to transmit the papers to the Collector. Thereafter, the Collector has to take appropriate steps for partition, as per the directions issued in the decree. Perusal of the said ruling also shows that the learned Single Judge has observed that if the partition suggested by the Collector is not as per the direction issued in the Decree or there is any other challenge to such partition suggested by the Collector, the aggrieved party has to file an appeal against the Order of the Collector before the authority prescribed under the Land Revenue Code. A dispute such as a partition cannot be brought before the Civil Court. On the basis of this ratio laid down in **Kisan Bhikaji Dalvi (supra)** the learned District Judge has set aside the order passed by the trial court.

5. With reference to this aspect, the learned

counsel for the appellant sought to put reliance on the ruling of this Court in this case of **Mahadu alias Mahadeo Bajji Bhosale s. Appaji Gunbarao @ Ganpatrao Bhosale** reported in **2003(1) ALL MR 1158** wherein the learned Single Judge, without reference to the case of **Kisan Bhikaji Dalvi (supra)**, concluded that Civil Court does not become functus officio after it sends the decree for partition. The Civil Court has jurisdiction to see if the Collector has acted in accordance with or contrary to the decretal mandate. In that case similar situation arose. In execution proceeding, decision of the Collector was challenged by the Petitioner by way of application under Section 47 of Civil Procedure Code, which was heard by the Civil Judge and after hearing the parties he came to the conclusion that Collector had not contravened the decretal order or transgressed the law relating to partition. The petitioner preferred an appeal against that order to District Court, who dismissed the appeal on the ground that no application complaining of the violation of the decretal mandate can be entertained by the Civil Court since the Civil Court becomes functus officio after it sends the decree to the Collector for partition under Section 54 read with Order XX Rule 18 of C.P.C. The appeal was preferred against

the said order in this Court wherein the learned Single Judge in **Mahadu Bhosale's case (supra)** has observed that the civil court does not become functus officio after it sends the decree to the Collector for partition and Civil Court has jurisdiction to see if the Collector has acted in accordance with or contrary to the decretal mandate.

6. In the present case before us the facts are more or less similar in nature. It is clear from the record that the appellant's share in the land at Athola was declared as 1/4th share, which would come to 27.75 gunthas, however, he was given only 26 gunthas plus three different small plots in three different survey numbers, out of which five gunthas was acquired for Canal before partition. Therefore, the appellant made an application for raising objection before the Civil Judge on 17.7.1995 in which the Civil Judge passed an order to send the matter again to Mamlatdar for effecting partitions and also passed an order regarding recovery of mesne profits. In other words, the appellant, returned to the Civil Court on the ground that though the decree granted him 1/4th share in the property which came to 27.75 gunthas but the Mamlatdar

deliberately granted him three different pieces admeasuring 26 gunthas and had ignored the decree passed in Regular Civil Suit No.10 of 1984, which was confirmed in appeal, and therefore, it was submitted on behalf of the appellant that the Civil Court was right in remitting the matter back to the Mamlatdar to effect partitions as per the decretal command and not otherwise.

. In view of this factual matrix, I am of the view that the ratio laid down by the Division Bench of this Court in the case of **Ningalappa Balappa and ors vs. Abashkhan Gouskhan reported in 1956 Bombay page 354** will have to be invoked, wherein it is observed as follows :

"it is true that it has been held in several cases that the Court is not entirely deprived of controlling the action taken by the Collector. But this control is very limited. It is to be exercised only if the Collector contravenes the decretal order or transgresses the law relating to partition or refuses to execute the decree."

The ratio laid down by the Division Bench is also

followed by the learned Single Judge of this Court in **Mahadu @ Mahadeo Bhosale's case (supra)** holding that Civil Court has jurisdiction to see if the Collector has acted in accordance with or contrary to the decretal mandate. The ratio laid down by the Division Bench is also followed by the learned Single Judge of this Court in another case (**Shri Shrikant R.Sankanwar and Ors. vs. Shri Krishna Balu Naukudkar** reported in 2003(1) ALL MR 1161).

. In this regard I must note that no doubt that after a decree for partition of land assessed to review has been passed, the court has nothing further to do with the decree. The decree is to be executed and the partition is to be effected by the Collector. There cannot, therefore, be any execution proceedings before the court in the case of such a decree. However, it is equally true that the Court is not entirely deprived of controlling the action taken by the Collector. But this control is very limited. It is to be exercised only if the Collector contravenes the decretal order or transgresses the law relating to partition or refuses to execute the decree. Therefore, if we apply this ratio to the set of facts involved in the present case, it is

quite clear that the Tahsildar who was acting under delegated powers from the Collector, and has transgressed his powers by acting not according to the decretal command, but giving less land than which was decreed, and that too with alleged possible malafide intention because the part of the allotted land was already under acquisition. If it was so, then in my considered view, the Civil Court was right in remitting the matter to the Mamlatdar for execution of the decree afresh according to the decretal command.

7. The learned counsel for the respondent submitted that under the Dadra Nagar Haveli Land Revenue Administration Regulation 1971 appeal lies under Section 230 to the appellate authority and therefore, the appellant had efficacious remedy against the order passed by Mamlatdar. However, in my considered view, this argument is devoid of merits mainly due to the reasons that Section 230 begins with the words "in absence of any express provisions of this regulation or any other law for the time being in force to the contrary...." Since the provision of the Civil Procedure Code including Order 20 Rule 18 gives right to the party to approach the Civil Court when the partition effected

by the Collector is not in accordance with the decretal mandate, there is no question of invocation of Section 230 of said Regulation, 1971 and thus such argument cannot be accepted.

8. For the reasons recorded above, I hold that the Civil Court, under given circumstances, is not rendered functus officio after it sends the decree to the Collector for partition under the provisions of Section 54 read with Order 20 Rule 18 of the Civil Procedure Code. In the result the rule is made absolute, the order passed by the District Judge is hereby set aside and the order passed by Civil Judge dated 1.2.2001 in Application No.4 of 1993 is restored, which is to the effect that the decree is to be sent to Mamlatdar for effecting the partition with regard to the plot of land in Athola Village as described in Schedule "B" in Regular Civil Suit No.10 of 1984 and other consequential reliefs. In view of the facts and circumstances there shall not be any order of costs.
